THE HON'BLE THE ACTING CHIEFJUSTICE BILAL NAZKI
AND
THE HON'BLE SRI JUSTICE RAMESH RANGANATHAN

W.P.Nos.13380 and 16040 of 2007

DATE: 31-12-2007

W.P.No.13380 of 2007

Between:

M/s.Saipem (Portugal) Commercio Martitimo SU Ltd. , Mathuradas Vasanji Raod, Andheri (East) Mumbai rep. By is Manager.

.....

Petitioner

and

The Commercial Tax Officer, Kakinada Circle, Kakinada and another.

..

Respondents

W.P.No. 16040 of 2007

Between:

M/s.Saipem (Portugal) Commercio Martitimo SU Ltd. , Mathuradas Vasanji Raod, Andheri (East) Mumbai rep. By is Manager.

.....

Petitioner

and

The Commercial Tax Officer, Kakinada Circle, Kakinada and another.

..

Respondents

THE HON'BLE THE ACTING CHIEFJUSTICE BILAL NAZKI
AND
THE HON'BLE SRI JUSTICE RAMESH RANGANATHAN

W.P.Nos.13380 and 16040 of 2007

ORDER: (The Hon'ble Sri Justice Ramesh Ranganathan)

W.P.No.13380 of 2007 is filed by M/s.Saipem (Portugal) Commercio Martitimo, SU Lda., to declare the action of the Commercial Tax Officer, Kakinada, in passing the order in proceedings dated 20-06-2007 treating the transaction of the rig operations as deemed sale, as illegal, arbitrary and without authority of law and to declare that the work executed by the petitioner for the Gujarat State Petroleum Corporation does not involve any transfer of property exigible to tax under the provisions of the Andhra Pradesh General Sales Tax Act, 1957 (for short 'APGST Act').

W.P.No.16040 of 2007 is filed by the very same Company to declare the action of the Commercial Tax Officer, Kakinada, in passing the assessment order in Form VAT-305 dated 19-07-2007 treating the transaction of the rig operations as deemed sale, as illegal, arbitrary and in violation of the law declared by the Supreme Court in **20th Century Finance Corporation Ltd. v. State of Maharashtra**[1] and the binding judgment of the Sales Tax Appellate Tribunal in **M/s.D.S.T. Site Office & M/s.SAIPEM India Project Office v. State of Andhra Pradesh**[2]**,** to set aside the same and to declare that the work executed by the petitioner

for the Gujarat State Petroleum Corporation does not involve any transfer of property exigible to tax under the provisions of the Andhra Pradesh Value Added Tax Act, 2005 (for short 'APVAT Act').

The petitioner is a Portugese Company having its project office at Bombay. It is a registered dealer under the APGST Act, 1957, APVAT Act, 2005 and the Central Sales Tax Act, 1956 (for short 'the Act') and an assessee on the rolls of the Assistant Commercial Tax Officer, Kakinada. It is engaged in the business of drilling, testing and abandoning of off shore wells. The Gujarat State Petroleum Corporation (hereinafter referred to as 'GSPC'), an undertaking of the Gujarat Government, along with its two joint venture partners, had entered into a production sharing contract with the Government of India on 04-02-2003 in respect of the contract area identified as KG-OSN-2001/3 exploration block under NELP/III off shore Andhra Pradesh Coast. Thereafter, the GSPC entered into a contract with the petitioner on 01-04-2004 at Gandhinagar, Gujarat for drilling, completing and abandoning the wells identified by it. Petitioner applied for registration with the Assistant Commercial Tax Officer, Kakinada in the month of October, 2004 under the APGST and CST Acts and was granted registration with effect from 09-03-2005. On the plea that it was not doing any business in purchase and sale of goods, and that the entire purchases were only for self-consumption, the petitioner reported its taxable turnover as 'Nil'.

Against the order of the Commercial Tax Officer, Kakinada dated 20-06-2007, which is the subject matter of challenge in W.P.No.13380 of 2007, the petitioner has a statutory remedy of

appeal under Section 19 of the APGST Act. Similarly, against the assessment order, in Form VAT-305 dated 19-07-2007, which is under challenge in W.P.No.16040 of 2007, Section 31 of the APVAT Act provides a remedy of appeal.

Under Article 226 of the Constitution, the High Court, having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. The High Court has, however, imposed upon itself certain restrictions one of which is that if an effective and efficacious remedy is available the High Court would not normally exercise its jurisdiction. But the alternative remedy has been held as not to operate as a bar in at least three contingencies, namely, where the writ petition has been filed for the enforcement of the Fundamental Rights or where there has been violation of the principle of natural justice or where the order or proceedings are wholly without jurisdiction or the vires of an Act is challenged.(**Whirlpool Corporation v. Registrar of trade marks**[3]**)**

In these writ petitions, the petitioner does not seek enforcement of fundamental rights nor does it allege violation of principles of natural justice. The vires of a statutory provision is also not under challenge. On a query as to why this Court should examine the validity of the impugned order on merits since these are all matters effectively adjudicated in statutory appeals, Sri S.R.Ashok, learned Senior Counsel appearing on behalf of the petitioner, would submit that he would confine his submissions only to the question of jurisdiction, as the remedy under Article

226 of the Constitution of India is not barred in such cases.

Sri S.R.Ashok, learned Senior Counsel, would contend that since the agreement was entered into in the State of Gujarat, the petitioner was not liable to be taxed under Section 5-E of the APGST Act within the State of Andhra Pradesh. Learned Senior Counsel would also contend that, since the subject matter of these writ petitions are covered by the judgment of the Supreme Court in **20th Century Finance Corporation Ltd.**[1] and the order of the S.T.A.T. in **M/s.D.S.T. Site Office**[2] to which the petitioner was a party, relegating the petitioner to the remedy of an appeal wherein they are required to deposit 12.5% of the tax due was not efficacious. Since, admittedly, the petitioner has an alternative remedy of an appeal under the statute, it is only on the limited question whether the impugned orders as passed were without jurisdiction that these writ petitions need be examined.

It is useful, in this context, to extract Section 5-E of the APGST Act and Section 4(8) of the APVAT Act.

Section 5-E of the APGST Act reads thus:

5-E Tax on the amount realized in respect of any right to use goods: Notwithstanding anything contained in this Act:

(a) Every dealer who transfers the right to use any goods for any purpose, whatsoever, whether or not for a specified period, to any lessee or licencee for cash, deferred payment or other valuable consideration, in the course of his business shall, on the total amount realized or realizable by him by way of payment in cash or otherwise on such transfer or transfers of the right to use such goods from the lessee or licencee, pay a tax at the rate of eight paise on every rupee of the aggregate of such amount realized or realizable by him during the year;

(b) the transfer of right to use any such goods entered into by any dealer, shall be deemed to have taken place in t his State whenever the goods are used within the State, irrespective of the place where the agreement whether written or oral for such transfer of right is made.

Provided that no such tax shall be levied if the total turnover of the dealer including such aggregate is less than Rs.two lakhs."

Section 4(8) of the APVAT Act reads thus:

"Every VAT dealer who transfers the right to use goods taxable under the Act for any purpose, whatsoever, whether or not for a specified period, to any lessee or licensee for cash, deferred payment or other valuable consideration, in the course of his business shall, on the total amount realized or realizable by him by way of payment in cash or otherwise on such transfer of right to use such goods from the lessee or licensee pay a tax for such goods at the rates specified inn the Schedules."

Sri S.R.Ashok, learned Senior Counsel appearing on behalf of the petitioner, would draw our attention to that portion of the impugned order wherein the first respondent, while referring to the order of the Tribunal in **M/s.D.S.T. Site Office**[2], had held that, in that case, the appellant had entered into a contract with ONGC for importing the oil drilling rig and other equipment with the condition that the entire equipment would be re-exported after it was over and, in the case before him, there was no mention of delivery conditions as was in the case before the Tribunal. The first respondent had held that, in the case before the Tribunal, the rig and equipment were delivered and handed over along with the crew by the petitioner and, according to the clause in the agreement, the Company was responsible for damage or loss of contractor's equipment and, therefore, the terms and conditions of the contract were different.

Learned Senior Counsel would refer to the main components of the terms and conditions of the contract entered into between M/s.GSPC and the petitioner where, under clause 3, on completion of services it is the responsibility of the contractor to take back

the unused material with intimation to the Company. Learned Senior Counsel would also refer to clause 4 of the contract dated 01-04-2004, whereunder it has been held thus:

> "The mobilization shall be effective only when the rig has physically moved on to the location, preloaded, jacked up to required height, picked up the drive pipe and ready to lower the first pipe through the rotary. The move rate shall be admissible when the rig has been released from one location after the conclusion of all operations at the location and shall extend till it is jacked up on the next location and ready to lower the first drive pipe and start operations. Demobilization shall be effected when the rig has secured the well and has been released by the Company representative to Jack down the hull at the last location, having offloaded any Company's and other Company contractors' equipment and materials. As a part of the PSC formalities the contractor is then expected to move/low the rig out of the PSC area at the earliest after duly re-exporting it."

He would also refer to the Bill of Entry for home consumption dated 21-04-2004, which relates to importation for the purpose of petroleum operations for the production sharing contract between the Government of India and M/s.GSPC. Learned Senior Counsel would also refer to the minutes of the meeting held between officials of M/s.GSPC and the petitioner during 3rd to 6th March, 2004 at Sharjah whereunder M/s.GSPC had confirmed its intention of hiring PN3 rig subject to its being technically qualified by third party inspection, it was recorded that a joint inspection of the Jack Up Rig PN3 was carried out on 03-03-2006 and the inspection of various other equipments were carried out on 04-03-2004, that during their visit to Ajman Port, Sharjah, the ongoing work on Perro Negro 3 Rig was noted and it was recorded that the petitioner had provided a copy of the Inspection Report recently carried out by the agency.

Learned Senior Counsel would also refer to the letter addressed to the petitioner by the M/s.GSPC on 10-03-2004 of

their intent to contract the “Perro Negro 3” jack up drilling rig for work off shore east coast of India to commence on or before 15-05-2004 based upon the mutually agreed contract which included the terms and conditions. Reference is made to the contract agreement dated 01-04-2004 which refers to the schedules attached to the contract and to schedule-B which is the equipment list and the specifications required to be provided by the contractor. Learned Senior Counsel would refer to the bill of lading of the petitioner which records that there was no transfer of ownership of the consignment vessel under any jurisdiction anywhere whatsoever. According to the learned counsel the conclusions of the first respondent, that the rig was originally described to M/s.GSPC by appropriate charts, drawings and written description and then was delivered off the coast of Kakinada in the State of Andhra Pradesh, that it was a case of sale by description wherein the goods were treated as unascertained goods, that ascertainment and confirmation of the goods as per the required norms of the parties happened after fitment of the necessary equipment at Kakinada in the State of Andhra Pradesh, India, and, therefore, the transaction was taxable as local sales, were perverse conclusions contrary to the overwhelming evidence on record. Learned Senior Counsel would submit that the minutes aforementioned would clearly show that the rig was, in fact, inspected and was not sold by description. Learned Senior Counsel would place reliance on **20th Century Finance Corporation Ltd.**[1] **and M/s.D.S.T. Site Office**[2].

Learned Special Standing Counsel for Commercial Taxes,

on the other hand, would submit that the rig was not ascertainable on the date of the contract, that it was a sale by description and involved delivery of the rig within the State, that parts of the rig were brought into India and it is only at Kakinada was the rig assembled and, as such, Section 5E of the APGST Act was clearly attracted. Learned Special Standing Counsel would refer to the portion of the order of the first respondent where the equipment, services and facilities furnished by the contractor and paid by the contractor on the items as per the applicable rates was referred to. Learned Special Standing Counsel would submit that these were all components of the rig and that it is only after these goods had entered India were they assembled as a rig at Kakinada. Learned Special Standing Counsel would refer to the portion of the order wherein the first respondent has made a detailed analysis of the agreement and had observed thus:

> "The main question involved in this case exigibility of sales tax on the hire charges received by SAIPEM from hiring of rig and supply of rig material and equipment to the customer i.e., GUJARAT STATE PETROLEUM CORPORATION in AP under the Act. It is enough to discuss the issue on the basis of the agreement and orders placed by the GUJARAT STATE PETROLEUM CORPORATION.
>
> The agreement contained two parts one is location of Rig and equipment as per the instructions of the customer and then leasing/hiring out of such rig and equipment on the basis of monthly charges, in the 2nd part. It is a running contract for using the Rig and equipment on rental basis by the customer and therefore the levy of tax on the amount received as hire charges for using the rig and equipment /rig, by the customer is clearly sustainable under the Act. The assessee is the owner of the goods and the use of the Rig by the GUJARAT STATE PETROLEUM CORPORATION on hire charges comes into operation only after reaching the rig to designated locations of the customer i.e., GUJARAT STATE PETROLEUM CORPORATION in Andhra Pradesh. The question of levying tax relating to the hire charges received by the SAIPEM from GUJARAT STATE PETROLEUM CORPORATION starts with leasing/hiring of rig and equipment."

Learned Special Standing counsel would submit that the rig was too big an equipment to be brought as it is into India. He would emphasize that it is not even the case of the petitioner, in the affidavits filed in support of the writ petitions, that the rig in its entirety was brought and put to use offshore at Kakinada. Learned Special Standing Counsel would submit that it is only parts and other sub-components of the rig which were brought into India and were assembled at the nearest port and, since the rig was assembled at Kakinada, Section 5E was attracted

Since both the counsel relied on the judgment of the Supreme Court in **20th Century Finance Corporation Ltd.**[1]**,** it is necessary to note the conclusions wherein the Supreme Court had observed thus:

"As a result of the aforesaid discussion our conclusions are these :

(a) The State in exercise of power under Entry 54 of List II read with Article 366 (29a) (d) are not competent to levy sales tax on the transfer of right to use goods, which is a deemed sale, if such sale takes place outside the State or is a sale in the course of inter-State trade or commerce or is a sale in the course of import or export.

(b) (b) The appropriate legislature by creating legal fiction can fix situs of sale. In the absence of any such legal fiction the situs of sale in case of the transaction of transfer of right to use any goods would be the place where the property in goods passes, i. e. where the written agreement transferring the right to use is executed.

(c) Where the goods are available for the transfer of right to use the taxable event on the transfer of right to use any goods is on the transfer which results in right to use and the situs of sale would be the place where the contract is executed and not where the goods are located for use.

(d) In cases where goods are not in existence or where there is an oral or implied transfer of the right to use goods, such transactions may be effected by the delivery of the goods. In such cases the taxable event would be on the delivery of goods.

(e) The transaction of transfer of right to use goods cannot be termed as contract of bailment as it is deemed sale within the meaning of legal fiction engrafted in clause (29a) (d) of Article 366 of the Constitution wherein the location or delivery of goods to put to use is

immaterial."

The transfer of the right to use goods, in certain situations, is taxable under Section 5-E of the APGST Act and under Section 4(8) of the APVAT Act.

While Sri S.R.Ashok, learned Senior Counsel appearing on behalf of the petitioner, would rely on the agreement dated 01-04-2004 between GSPC and the petitioner, the contract conditions and other documents, to contend that the sale took place outside the State of Andhra Pradesh and since the situs of the transaction, whereby the right to use the rig was transferred, had taken place where the property in goods had passed which was outside the State of Andhra Pradesh, and as the written agreement transferring the right to use the rig was executed in the State of Gujarat, no tax could be levied on the petitioner within the State of Andhra Pradesh either under the APGST Act or the APVAT Act. Reliance is placed by the learned Senior counsel on sub-para (a) and (b) of paragraph 35 of the judgment in **20th Century Finance Corporation Ltd.**[1]**,** in support of these submissions.

Learned Special Standing Counsel for Commercial Taxes, on the other hand, would contend that since the rig was not in existence when the agreement was entered into on 01-04-2004, and its parts and sub-assemblies were imported and assembled at Kakinada, transfer of the right to use the rig was effected by delivery of goods at Kakinada, the taxable event was on the delivery of goods at Kakinada and as such the first respondent was justified in levying tax under Section 5-E of the APGST Act and Section 4(8) of the APVAT Act. He would rely on sub-para (d) of para 35 of the judgment of Supreme Court in **20th Century**

Finance Corporation Ltd.[1]**,**

While Sri S.R.Ashok, learned counsel for the petitioner, would place reliance on the order of the Tribunal in **M/s.D.S.T. Site Office**[2], whereunder the Tribunal had held that the amounts received by the petitioner from ONGC for drilling operations, for and on behalf of ONGC, were not taxable, and submit that the order of the Tribunal, to which the petitioner was a party, had attained finality and was binding on the respondents, learned Special Standing Counsel for Commercial Taxes would refer to the impugned order, wherein the first respondent had relied on a judgment of this Court in **Onway Engineering Private Ltd. v. State of Andhra Pradesh**[4], to hold that, in view of the judgment of this Court, the order of the Tribunal in **M/s.D.S.T. Site Office**[2], was no longer good law.

While this Court would exercise its discretion, to entertain a writ petition, where the orders impugned are without jurisdiction, it cannot be lost sight of that the question of jurisdiction can as well be raised by the petitioner in appellate proceedings. The facts referred to hereinabove would show that even the basis facts, necessary to examine whether or not the requirements of Section 5-E of the APGST Act, and Section 4(8) of the APVAT Act, are satisfied, is itself in dispute. Both parties are not *ad idem*. It is well settled that this Court would refrain from exercising its discretion to adjudicate disputed questions of fact when these aspects can as well be adjudicated in appellate proceedings under the provisions of the APGST and the APVAT Acts. The mere fact that the petitioner is required to deposit 12.5% of the tax, which is a statutory requirement for preferring an appeal, would not, by

itself, render the remedy of an appeal onerous nor can a party be permitted to circumvent this statutory requirement, and avoid the appellate remedy under the Act, by invoking the extra-ordinary jurisdiction of this Court under Article 226 of the Constitution of India.

Leaving it open to the petitioner, to avail the remedy of an appeal under the APGST and APVAT Acts, the Writ Petitions are dismissed. It is made clear that we have not expressed any opinion on merits and facts have been briefly referred to only to show that they are in dispute and that this Court would not adjudicate disputed questions of fact. It is also made clear that the writ petition has been dismissed not on merits but on the ground that the petitioner has an alternative remedy of a statutory appeal against the orders impugned herein. No costs.

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BILAL NAZKI, J

Date: 31.12.2007

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RAMESH RANGANATHAN, J

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[1] (2000) 119 STC 182

[2] 12(1991) APSTJ 187

3 1998(8) SCC 1

[4] 39 APSTJ 173